# STATE OF MICHIGAN

# COURT OF APPEALS

| | |
|---|---|
| PEOPLE OF THE STATE OF MICHIGAN,<br><br>Plaintiff-Appellee, | UNPUBLISHED<br>January 11, 2000 |
| v | No. 209600<br>Kalamazoo Circuit Court |
| OCTAVIER LANCE MYLES,<br><br>Defendant-Appellant. | LC No. 97-000948 FC |

| | |
|---|---|
| PEOPLE OF THE STATE OF MICHIGAN,<br><br>Plaintiff-Appellee, | |
| v | No. 209665<br>Kalamazoo Circuit Court |
| DAVID WILLIAMS,<br><br>Defendant-Appellant. | LC No. 97-000947 FC |

Before: Zahra, P.J., and Kelly and McDonald, JJ.

PER CURIAM.

Defendants Myles and Williams were each convicted of first-degree criminal sexual conduct, MCL 750.520b; MSA 28.788(2), and second-degree criminal sexual conduct, MCL 750.520c; MSA 28.788(3), following a jury trial. Defendant Myles was sentenced as a second-felony habitual offender, MCL 769.10; MSA 28.1082, to concurrent prison terms of twenty to thirty years for the first-degree CSC conviction and 7 to 22-1/2 years for the second-degree CSC conviction. Defendant Williams was sentenced to concurrent prison terms of fifteen to twenty-five years for the first-degree CSC conviction and seven to fifteen years for the second-degree CSC conviction. Defendants appeal as of right. We affirm.

Defendants' convictions arise from their participation in the sexual assault of a fifteen-year-old girl, committed by several youths on school grounds.

I.

Both defendants claim that the trial court abused its discretion, requiring reversal, in permitting the victim's psychiatrist, Dr. Chetan Vyas, to testify that the victim suffered post-traumatic stress disorder. We disagree.

Neither defendant objected to the testimony now challenged on appeal and, therefore, we review defendants' arguments to determine whether the trial record exhibits plain error that affected defendants' substantial rights. *People v Carines*, 460 Mich 750, 763-764; 597 NW2d 130 (1999); *People v Grant*, 445 Mich 535; 520 NW2d 123 (1994). Under this standard of review, reversal is warranted only when the error results in the conviction of an actually innocent defendant or seriously affects the fairness, integrity or public reputation of judicial proceedings. *Carines*, *supra*. Defendants have failed to show that the admission of Dr. Vyas' testimony, now challenged for the first time on appeal, constituted plain error affecting their substantial rights.

Expert testimony is admissible in a sexual assault case if it is from a recognized discipline, it serves to give the trier of fact a better understanding of the evidence or assist in determining a fact in issue, and it is presented by a witness qualified by "knowledge, skill, experience, training, or education . . . ." MRE 702; *People v Christel*, 449 Mich 578, 587; 537 NW2d 194 (1995); *People v Beckley*, 434 Mich 691, 711; 456 NW2d 391 (1990). The mental health discipline is a recognized field of specialized knowledge. *Beckley*, *supra* at 718. Further, post-traumatic stress disorder is a recognized mental disorder. *Id.* at 706, n 15.

Dr. Vyas' testimony was properly offered to assist the jury to better understand the evidence. In their opening statements both defendants attacked the victim's post incident behavior and her credibility. Therefore, the prosecution was entitled to offer evidence to explain why the victim may have displayed unusual post incident behavior or appeared less than credible. See *People v Peterson*, 450 Mich 349, 373-375; 537 NW2d 857 (1995); *People v Lukity*, 460 Mich 484, 501-502; 596 NW2d 607 (1999).

We find no merit in defendants' argument that the expert's opinion regarding post-traumatic stress disorder amounted to an opinion on an ultimate issue of fact. See *Beckley*, *supra* at 727. The ultimate issue in this case is whether the alleged abuse or sexual assault actually occurred; not whether the victim suffered from post traumatic stress disorder. Dr. Vyas appropriately testified regarding the typical symptoms of post-traumatic stress disorder and testified regarding the relevant and specific aspects of the victim's behavior to explain the victim's post incident behavior, including her delay in reporting the assault, her secrecy, and her memory loss. *Peterson*, *supra* at 373; *Christel*, *supra* at 591; *Beckley*, *supra* at 717, 727. At no time did Dr. Vyas testify that sexual abuse had actually occurred, that the victim was being truthful, that she identified the defendants, or that the defendants

were guilty. *Peterson, supra* at 369. Cf. *People v Meeboer*, 439 Mich 310; 484 NW2d 621 (1992); *People v LaLone*, 432 Mich 103, 110; 437 NW2d 611 (1989).[1]

We also find that Dr Vyas was qualified by his education, experience and training to offer an expert opinion relating to post traumatic stress syndrome.[2] Accordingly, the testimony to which defendants take exception on appeal was properly admitted under MRE 702, and we find no plain error arising from this testimony.

II.

Defendant Myles claims that he was denied his right to a fair trial and the effective assistance of counsel by the admission of evidence of an altercation engaged in by codefendant Williams shortly before the sexual assault on the victim.

Myles' defense counsel did not object to admission of the evidence regarding the altercation and we conclude that defendant Myles has not established that the admission of the evidence of the altercation involving defendant Williams constituted a "plain error" that affected his substantial rights. *Carines, supra; Grant, supra*. Evidence concerning the altercation was part of the res gestae of the events involving the victim and her attackers, and the jury was entitled to hear the "complete story." See *People v Sholl*, 453 Mich 730, 742; 556 NW2d 851 (1996). Moreover, as defendant Myles concedes on appeal, evidence of the altercation was relevant as to himself, and therefore admissible under MRE 401 and MRE 402, because the time of the altercation helped establish the time at which the offense against the instant victim occurred.

Defendant Myles was not denied the effective assistance of counsel due to counsel's failure to request a limiting instruction concerning use of this evidence. To prevail on his claim of ineffective assistance of counsel, defendant must show that his counsel made an error that was so serious that it deprived him of a fair trial, i.e., "that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Strickland v Washington*, 466 US 668, 694; 104 S Ct 2052; 80 L Ed 674 (1984); *People v Pickens*, 446 Mich 298, 302-303; 521 NW2d 797 (1994). Here, although defense counsel did not request a limiting instruction concerning this specific evidence, any error in counsel's failure to do so is harmless because the trial court instructed the jury that it should consider each defendant separately and that "if any evidence was limited to one defendant, you should not consider it as to any other defendant." The jury is presumed to follow the court's instructions. *People v Hana*, 447 Mich 325, 351; 524 NW2d 682 (1994). The court's instructions fairly and adequately protected defendant Myles' substantial rights because it was clear from the evidence presented that defendant Myles was not involved in the altercation at the Theodore residence. No miscarriage of justice resulted to defendant Myles and reversal is not warranted on this basis. MCL 769.26; MSA 28.1096; *Grant, supra*.

To the extent that defendant Myles is arguing that his trial counsel was ineffective for failing to request a curative instruction regarding the prosecutor's remarks in closing argument concerning the altercation, such an argument is without merit because the prosecutor, upon objection by defense counsel, corrected any false impression that he may have given the jury that defendant Myles was

involved in the altercation. Any prejudice to defendant was alleviated and, accordingly, there was no need for a curative instruction regarding the prosecutor's comments.

III.

Defendant Myles next claims that his Sixth Amendment right to confront the witnesses against him was violated when a police detective testified about a statement made by codefendant Williams. The detective testified that Williams claimed that Myles was at the basketball game with him the night of the instant offense. Defendant Myles argues that the hearsay statement was damaging because Myles presented an alibi defense that he was *home*—not at the basketball game—when the victim was sexually assaulted. Defendant Myles asserts that elicitation of the testimony violated his right to confront the witnesses against him because he did not have an opportunity to cross-examine defendant Williams, who did not testify at trial, concerning the statement.

Our review is de novo, in which we undertake a case-by-case approach and decide whether the statement incriminates the defendant against whom it is inadmissible in such a way as to create a "substantial risk" that the jury will look to the statement in deciding on that defendant's guilt, despite a cautionary instruction by the trial court. *People v Frazier (After Remand)*, 446 Mich 539, 549; 521 NW2d 291 (1994); *People v Banks*, 438 Mich 408, 421; 475 NW2d 769 (1991).

It is error to allow a powerfully incriminating unredacted statement, made by a nontestifying codefendant, to be admitted at trial. *Bruton v United States*, 391 US 123, 135-136; 88 S Ct 1620; 20 L Ed 2d 476 (1968); *Frazier*, *supra* at 544. However, defendant Myles' right of confrontation guaranteed by the US Const, Am VI and Const 1963, art 1, § 20, was not violated by the elicitation of the statement made by nontestifying codefendant Williams to Officer Smith. The statement in question was not facially incriminating to defendant Myles. Moreover, upon objection, the question to Officer Smith was withdrawn and the jury was promptly instructed to ignore the statement at issue. Although the statement may have been inferentially incriminating to defendant Myles, because he asserted an alibi defense other than being at the basketball game, the inference was not powerfully incriminating and the jury in this case could be presumed to have followed the court's instruction to ignore the statement. *Hana*, *supra.* See *Frazier*, *supra* at 541-542, 547-548, 563-564; *Banks*, *supra* at 417-418; *People v Perez-DeLeon*, 224 Mich App 43, 60; 568 NW2d 324 (1997).

IV.

Both defendants claim that the trial court abused its discretion in admitting, over defense counsels' continuing objections, hearsay statements of the victim made to others about the incident at issue.

We conclude that the trial court did not abuse its discretion in admitting the statements at issue. *Lukity*, *supra* at 488; *People v Starr*, 457 Mich 490, 494; 577 NW2d 673 (1998). Because defendants argued that the victim had fabricated her story, had presented at least four different versions

of her story, and had improper motives or been improperly influenced to make her statements, the prosecution was entitled to present the victim's full story, including her prior statements that were consistent with her trial testimony, in order to rebut defendants' claims in this regard. MRE 801(d)(1)(B). Further, where, as here, the victim was in court and subject to cross-examination regarding her statements, the admission of her statements through third parties was appropriate. *People v Brownridge,* 225 Mich App 291, 302; 570 NW2d 672 (1997), modified on other grounds 459 Mich 456 (1999). Statements made by the victim immediately after the sexual assault were also admissible under the excited utterance exception. MRE 803(2); *People v Smith*, 456 Mich 543, 550-552; 581 NW2d 654 (1998).

We agree with the trial court that the victim's state of mind *was* at issue during trial. Thus, statements made by the victim regarding her fears, anxiety, and other emotional and physical conditions, including her physical manifestation of these mental and physical conditions, were admissible under MRE 803(3) to explain her behavior following the sexual assault. See *People v King*, 215 Mich App 301, 309; 544 NW2d 765 (1996).

V.

Defendants also argue they are entitled to reversal of their convictions because of improper prosecutorial remarks during closing argument. We find no merit in this argument.

As defendants acknowledge, there was no objection to any of the remarks now challenged on appeal. Our review of allegedly improper remarks is precluded unless an objection could not have cured the error or a failure to review the issue would result in a miscarriage of justice. *People v Stanaway*, 446 Mich 643, 687; 521 NW2d 557 (1994); *People v Duncan*, 402 Mich 1, 15-16; 260 NW2d 58 (1977).[3] We conduct a de novo review in which we examine the remarks in context to determine whether they denied defendants a fair trial. *People v Bahoda*, 448 Mich 261, 266-267; 531 NW2d 659 (1995).

We conclude that all of the arguments were proper in relation to the evidence and the defense arguments presented at trial. *Bahoda, supra* at 282; *People v Messenger,* 221 Mich App 171, 181; 171 NW2d 463 (1997); *People v Launsburry,* 217 Mich App 358, 361; 551 NW2d 460 (1996). The prosecutor did not invoke the prestige of his office and improperly vouch for the credibility of the victim. *Bahoda, supra* at 276-277. Defendants were not denied a fair trial by the remarks of the prosecutor in closing argument.

VI.

Finally, defendant Williams argues, in propria persona, that the trial court plainly erred in instructing the jury on reasonable doubt because the court's instruction failed to inform the jury that proof beyond a reasonable doubt means that jurors must be "morally certain" of guilt. Defendant Williams also argues that his trial counsel was ineffective for failing to request an instruction on reasonable doubt that included the concept of proof of guilt to a moral certainty.

The trial court did not err in failing to include "moral certainty" language in its instruction on reasonable doubt. The trial court's instruction, which was based on CJI2d 3.2(3), adequately conveyed the concept of reasonable doubt to the jury. See *Victor v Nebraska*, 511 US 1; 114 S Ct 1239; 127 L Ed 2d 583 (1994); *People v Hubbard (After Remand)*, 217 Mich App 459, 487-488; 552 NW2d 493 (1996); *People v Sammons*, 191 Mich App 351, 372; 478 NW2d 901 (1991). Because no instructional error occurred, there is no support for defendant's claim of ineffective assistance of counsel on this asserted basis.

Affirmed.

/s/ Brian K. Zahra
/s/ Michael J. Kelly
/s/ Gary R. McDonald

[1] We also find disengenuous defendants' argument that Dr. Vyas impermissibly invaded the province of the jury and rendered a legal conclusion that a sexual assault had occurred because he testified to his awareness of the alleged sexual assault. The testimony at issue—wherein Dr. Vyas' testified that he had been told by another doctor that the victim had *allegedly* gone through a traumatic sexual assault at gunpoint—*was elicited on cross-examination by defense counsel*. Defendants should therefore not be heard to complain and cannot now use this as an appellate parachute. *Beckley, supra* at 731.

[2] Although both defendants now complain that Dr. Vyas was not "qualified" as an expert to give testimony on post-traumatic stress disorder, they should not be heard to now complain that Dr. Vyas testified as an "expert" where neither defendant presented an objection below on this basis. See *Beckley, supra* at 731. Moreover, the record reveals that Dr. Vyas had the requisite qualifications to offer an expert opinion in this regard. MRE 702.

[3] *People v Carines, supra*, suggests that the miscarriage of justice standard of review is equivalent to the review for plain error. Thus, we will not reverse a conviction unless the alleged error results in the conviction of an actually innocent defendant or otherwise seriously affects the fairness, integrity or public reputation of judicial proceedings. *Id.*